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IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,
VS.
ROY STROUD,
RESPONDENT.

No. 168

BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,
VS.
ROY STROUD,
RESPONDENT.
No. 547.

BRIEF OF PETITIONER.

STATEMENT.

This is a suit originally instituted in the Circuit Court of Ripley County, in the State of Missouri, by respondent herein for damages alleged

to have resulted from the unlawful discrimination by the petitioner in favor of other shippers and against respondent. The suit is based upon Sections 9985 and 9990. The former section prohibiting the discrimination, and the latter fixing the penalty therefor. The petition further alleges that on the 12th day of June, 1920, respondent ordered two cars from the agent of petitioner to be placed for him for the purpose of loading and shipping lumber at the station on petitioner's line known as Oxly, Missouri; that petitioner furnished cars to other shippers of lumber from said point on orders made after the 12th day of June, 1920, and said cars were furnished prior to the time that cars were furnished respondent in compliance with its order of June 12, 1920, thereby giving preference to other shippers over respondent, and asked for the penalty as provided by section 9990 of the State Statutes of three times the amount of damages sustained by respondent by reason of the alleged discrimination. The answer denies the discrimination as pleaded in the petition, and sets up the further fact that all cars, if any, which were furnished other shippers in preference to the cars furnished respondent, were furnished to interstate shippers and under orders of the Interstate Commerce Commission, giving the preference to said interstate shippers.

The facts in the case, so far as are material to this application, are as follows: Stroud on June 12, 1920, ordered two cars from the agent of your

petitioner at Oxly, Missouri, to be there delivered to him for the shipment of a quantity of lumber to the City of St. Louis, Missouri. It was claimed on the trial of the cause, and there was some evidence to that effect, that after the order for the two cars above mentioned was made by Stroud, other shippers ordered cars for the shipment of lumber from the same point to points outside of the State of Missouri; and that said last mentioned orders for cars were filled before the delivery by petitioner of the two cars to Stroud, resulting in discrimination, it is claimed, in favor of interstate shippers and against Stroud, an intrastate shipper. The evidence further showed that had the cars ordered by Stroud been shipped from Oxly to St. Louis, Missouri, they would have been routed through the State of Illinois, thereby making them interstate shipments.

At the close of the trial the court gave to the jury the following instruction:

> "The court instructs the jury that if you believe and find from the evidence in this case, that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions

imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff, and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000.00."

This instruction tells the jury that if other shippers ordered cars subsequent to the time respondent ordered cars, that these shippers were furnished cars prior to the time respondent's cars were furnished, that unless these cars furnished other shippers were to be used for shipping mine props or other mine material, which had a preference under the ruling of the Interstate Commerce Commission, they should find for the plaintiff. This leaves out of consideration entirely the question whether or not cars furnished other shippers or Stroud were to be used in interstate commerce. It is petitioner's contention that if any of such cars were so used, then respondent has no cause of

action under the Missouri Statute, and his cause of action, if any he has, was under the Act to regulate Commerce, which provided in Section one thereof, that the Interstate Commerce Commission shall have jurisdiction over the question of the supply and distribution of cars; and Section three as amended February 28, 1920, provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Assignment of Errors.

I.

The court erred in giving to the jury the instruction set out in this brief at pages 3 and 4.

II.

The court erred in failing to limit the jury by said instruction to cars to be used in Intrastate Commerce.

III.

The court erred in allowing the respondent to recover the penalty provided by the State Statute.

Brief

Section 9985 of the Missouri Statutes of 1919, reads as follows:

> "Discrimination between person or localities prohibited.—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business."

Section 9990 of the Missouri Statute of 1919, reads as follows:

"Penalty—triple damages for violation of this law.—In case any such common carrier shall do or cause to be done any act or things in Sections 9980 to 9994, inclusive, prohibited or declared to be unlawful, or shall omit to do any act or thing in said sections required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said sections, together with a reasonable attorney's fee, to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case."

Section 1 of the Hepburn Act, without quoting the whole section, provides:

"Shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevaton and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

And further on the section has this provision:

"And shall furnish cars for the movement of such traffic to the best of its ability without

discrimination in favor of or against any such shipper."

Section 8 of said Act providing the penalty, is is follows:

> "Liability to persons injured by violation of act.—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case (24 Stat. L. 382)."

The cars ordered by Stroud were for an interstate shipment, and some of the cars which the proof shows were furnished on orders made subsequent to the order of Stroud, before Stroud's order was filled, were interstate shipments. The Federal Statute controlled and not the State Statute.

It would seem that Congress undertook to legislate concerning the furnishing of cars for interstate shipment, and if so the Federal Statute takes precedence over any State Statute on the subject of interstate commerce.

Adams Express Co. vs. Croninger, 226 U. S., 491.

Southern R. R. Co. vs. Reid, 222 U. S., 424.

Northern Pacific Railway Co. vs. Washington *ex rel,* Atkinson, 222 U. S., 370.

Erie R. R. Co. vs. People of State of N. Y., 233 U. S., 671.

Charleston West Carolina Railway Co. vs. Varnville Furniture Co., 237 U. S., 597.

C., R. I. & P. Railroad Co. vs. Farmers Elevator Co., 226 U. S., 426.

Argument

This suit is based on the State Statute of the State of Missouri, and seeks to recover a penalty for three times the amount of damages sustained by reason of the railroad failing to furnish the respondent cars in which to load his lumber, and claiming that the railroad company discriminated against him, or rather gave a preference to other shippers, and furnished to them cars before those furnished to respondent, although ordered after respondent ordered his cars. The State Statute provides a penalty for unreasonable and unlawful discriminations. It would seem from the statute above quoted that Congress has also legislated on this subject in so far as it affects interstate shipments, and has also provided a penalty for unlawful discrimination in the supplying of cars for that class of shipment. The evidence in the case (see Ab. of record copy of order book between pages 18 and 19) shows that some of the cars ordered after respondent ordered his two cars, which was June 12, 1920, were furnished to the other shippers before respondent received his cars, and that the said cars furnished other shippers were for interstate shipment, and therefore it is our contention that the Federal law governed, and no suit could be maintained upon the State Statute, and for a penalty provided

by State Statute, but any suit for this class of discrimination would be governed by the Federal Statute and the penalty therein provided, and this we contend is true, although the cars which respondent ordered were not intended for an interstate shipment. The testimony of Mr. Brice, Superintendent of Transportation of the Missouri Pacific Railroad (see Ab. of record, pages 34-39) shows that the cars ordered on June 12, 1920, by respondent for the purpose of shipping lumber from Oxly, Missouri, to St. Louis, Missouri, would have gone through the State of Illinois, and therefore would have been an interstate shipment. It would seem that this court has practically put the question at rest by its opinion in the case of C. R. I. & P. R. R. Co. vs. Farmers Elevator Co., *ib.* where Chief Justice White said:

> "In the original act (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat. Supp., 1911, p. 1284) to regulate commerce the term 'transportation' was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn act it was declared that the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to

provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement Section 1 of the original act, imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by Section 8 it is provided 'that in case any common carrier subject to the provisions of this act———shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case'. Further, by Section 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an

action for the recovery of damages; and by Section 10 it is made a criminal offense for an employee of a corporation carrier to 'wilfully omit or fail to do any act, matter or thing in this act required to be done'.

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme It results, therefore, that in a case where, from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive power. Southern R. Co. v. Reid, 222 U. S., 424, 56 L. Ed., 257, 32 Sup. Ct. Rep., 140."

It will be noticed that instruction No. 1 given on behalf of respondent by the trial court (see Ab. of record, p. 46) permits the jury to find for the

respondent, regardless of whether or not any of the cars ordered were to be used in interstate commerce, and this is the one point in this case which gives jurisdiction to this court. The burden of showing that the cars furnished other shippers before they were furnished to respondent, which said cars had been ordered after respondent filed his order for cars, had not been used for interstate commerce rested upon the respondent. Whether this be technically true or not the evidence shows conclusively that those cars were used in interstate commerce, and the instruction failed to require the jury to find this fact either one way or the other.

The argument is made in the opinion of the Springfield Court of Appeals that to give one shipper undue or unreasonable preference or advantage is bound to result in undue or unreasonable prejudice or disadvantage to some other shippers, because there could be no advantage if only one shipper were involved, and reaches the conclusion that to charge undue or unreasonable preference or advantage is equivalent to a charge of undue or unreasonable prejudice or disadvantage. The court reaches the further conclusion that the common carrier may not, without just reason, ruin a man's business by refusing to serve him and then escape liability therefor merely, because the injured one cannot prove the carrier has shown undue preference towards another, and therefore the party injured would have no remedy. This argument leaves out of view entirely the remedy pro-

vided by Congress which governs interstate shipments. It will be observed that the act of Congress provides a penalty against the carrier who shall fail to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper". The Federal Statute and the State Statute in so far as they prohibit the discrimination in the furnishing of cars to shippers cover the same field, or rather cover the same acts, by prohibiting the discrimination in favor of or against any shippers. The question then narrows itself down to whether or not the cars ordered were for interstate commerce. It certainly could not be contended that the carrier violated both statutes as this would be intolerable. It is our contention, therefore, that Congress entered this field in so far as interstate shipments are concerned, and that having done so it took exclusive control of the subject, and the remedy if any is under the Federal Act exclusively. We submit that the opinion of the Springfield Court of Appeals should be reversed, and as the evidence shows without dispute that the cars were to be used in interstate commerce the case should be reversed without remanding.

Respectfully submitted,
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